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BEFORE THE ARIZONA CORPORATION COMMISSION

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COMMISSIONERSAZ CORP COMMISSION
DOCKET CONTROL

KRISTIN K. MAYES, Chairman
 GARY PIERCE
 PAUL NEWMAN
 SANDRA D. KENNEDY
 BOB STUMP

IN THE MATTER OF THE APPLICATION
 OF JOHNSON UTILITIES, LLC, DBA
 JOHNSON UTILITIES COMPANY FOR AN
 INCREASE IN ITS WATER AND
 WASTEWATER RATES FOR CUSTOMERS
 WITHIN PINAL COUNTY, ARIZONA.

DOCKET NO. WS-02987A-08-0180

**RESPONSE TO SWING FIRST
 GOLF'S MOTION TO
 DISREGARD JOHNSON
 UTILITIES' OPENING BRIEF
 REGARDING THE
 ADMISSIBILITY OF
 TRANSCRIPT**

I. INTRODUCTION.

At the April 27, 2009, hearing in the above-captioned matter, the Administrative Law Judge ("ALJ") directed the parties including Johnson Utilities, L.L.C. ("Johnson Utilities" or the "Company") and Swing First Golf, LLC ("SFG") to brief the admissibility of the transcript made by SFG (the "Transcript") of a recorded meeting and conversation that took place on February 1, 2008, between SFG's manager, David Ashton, and Gary Larsen, an employee of Johnson Utilities at the time.¹ The ALJ also stated that the opening and responsive briefs would be due at noon on May 22 and 29, respectively.²

On May 29, 2009, SFG filed its reply brief requesting that the Company's opening brief be "rejected and disregarded" on the basis that the Company's opening

Arizona Corporation Commission
DOCKETED

JUN - 1 2009

¹ Tr. at page 352, lines 13-15, 17-18.² Id. at lines 23-24.

DOCKETED BY

Snell & Wilmer

LLP
 LAW OFFICES
 One Arizona Center, 400 E. Van Buren
 Phoenix, Arizona 85004-2202
 (602) 382-6000

1 brief was filed after the noon deadline on May 22, 2009. Because the request that the
2 Arizona Corporation Commission ("Commission") disregard the Company's opening
3 brief is analogous to a motion to strike, which is outside the scope of SFG's reply to the
4 issues set forth in Johnson Utilities' opening brief, the Company believes it is entitled to
5 respond to this request separately. Moreover, because SFG has once again cast spurious
6 allegations against the Company and its law firm, Johnson Utilities feels compelled to
7 respond in order to set the written record straight. Accordingly, Johnson Utilities,
8 through counsel undersigned, hereby responds to SFG's request to disregard its opening
9 brief but will not respond to any other portion of SFG's reply brief.

10 **II. MISSING THE NOON FILING DEADLINE BY APPROXIMATELY FIVE**
11 **HOURS WAS DUE TO AN HONEST MISTAKE THAT CAUSED NO**
12 **UNDUE HARM OR PREJUDICE TO SFG.**

13 Johnson Utilities does not deny that it mistakenly believed the deadline for
14 submitting its opening brief was 5:00 PM instead of 12:00 noon on May 22. However,
15 this was an honest mistake and not a result of any intentional conduct. In support of the
16 fact that the delay was the result of an honest mistake, Johnson Utilities notes that a
17 12:00 noon filing deadline is relatively uncommon at the Commission.

18 A. Johnson Utilities' made a good faith attempt to mitigate its mistake.

19 Believing that the deadline for filing its opening brief was 5:00 PM, counsel for
20 Johnson Utilities dispatched runners to hand-deliver copies of the brief to the ALJ,
21 Utilities Division Staff, the Residential Utility Consumers Office ("RUCO"), and SFG.
22 A Notice of Compliance was filed with docket control at 4:50 PM on May 22, and
23 copies were hand-delivered to the ALJ and Utilities Division Staff several minutes later.
24 Attachment A shows that the Company docketed its Notice of Compliance at 4:50 PM.
25 While the runner arrived at RUCO's office prior to 5:00 PM, the copy could not be
26 delivered because the office had closed early ahead of the Memorial Day holiday. Co-

1 counsel for the Company, Robert Metli, personally took a copy of the opening brief to
2 the designated UPS Store mail drop-off point for counsel for SFG.

3 At 4:52 PM on May 22, in what was ironically thought to be a courtesy, counsel
4 for Johnson Utilities sent counsel for SFG an e-mail to let him know that Mr. Metli was
5 on his way to the UPS Store drop-off point to deliver the brief.³ A copy of that e-mail is
6 attached as Attachment B. At 5:09 PM, counsel for SFG sent a terse e-mail to counsel
7 for Johnson Utilities (and copied all parties) accusing counsel of missing the deadline
8 and stating that he had no intention of returning to his mail drop to pick up the brief. A
9 copy of that e-mail is attached as Attachment C.

10 As soon as counsel for Johnson Utilities received this e-mail (which SFG attached
11 as Appendix A to its reply brief), counsel for Johnson Utilities reviewed the April 27,
12 2009, hearing transcript and realized that the deadline had, in fact, been 12:00 noon.
13 Ten minutes later, at 5:19 PM, counsel for Johnson Utilities immediately sent an e-mail
14 to counsel for SFG that: (i) apologized for missing the deadline; (ii) explained that
15 missing the deadline was an honest mistake; and (iii) provided a confidential electronic
16 copy of the opening brief. A copy of this e-mail is attached as Attachment D.⁴ At that
17 same time, Mr. Metli tried calling counsel for SFG on his mobile phone to offer instead
18 to bring a copy of the brief to his home so that he would not have to return to the UPS
19 Store. However, counsel for SFG did not answer his phone so Mr. Metli left a voicemail
20
21

22 ³ Counsel for SFG has a mailbox in a UPS Store for which personal service is accepted. On at least one prior
23 occasion, the UPS Store has refused to accept delivery of a hand-delivered document and on virtually every
24 occasion the runner for Johnson Utilities either has to talk the clerk into accepting the hand-delivery or purchase
25 postage from the UPS Store before the hand-delivery is accepted.

26 ⁴ The Company had not initially intended to provide electronic copies of its opening brief because of the
confidential information contained therein. The ALJ was sensitive to this when she stated at the hearing that "the
briefs may be submitted under seal if the parties deem it necessary." (Tr. at page 352, lines 15-16.) However, once
counsel for Johnson Utilities realized the mistake, he sent the Company's opening brief via e-mail to avoid any
further delay.

1 message making the same offer to drop off a copy of the brief at counsel's home.
2 Counsel for SFG ignored Mr. Metli's offer and never returned the call.

3 Not surprisingly, counsel for SFG failed to mention or attach the 5:19 PM e-mail
4 from counsel for Johnson Utilities or mention the fact that Mr. Metli had tried to contact
5 him by phone and thereafter left a message offering to personally deliver a copy of the
6 brief to counsel's home. Rather, counsel for SFG left the ALJ and the Commission with
7 the impression that Johnson Utilities made no attempt to mitigate the mistake and
8 asserted that, but for his e-mail, SFG would not have received a copy of the opening
9 brief until "92 hours after it was due to the parties."⁵ In fact, counsel for SFG received a
10 hand-delivered hard copy of the opening brief at his UPS Store mail drop shortly after
11 5:00 PM, an electronic copy at his computer at 5:19 PM, and an offer to hand-deliver a
12 hard copy to his home. Counsel's statement that Johnson Utilities' filing was "92 hours"
13 late is simply absurd.

14 B. SFG was not harmed or prejudiced by its receipt of Johnson's opening
15 brief approximately five hours late.

16 If SFG believed it was prejudiced by the timing of its receipt of the Company's
17 opening brief, it could have and should have asked for an extension of time to file its
18 reply brief. Johnson Utilities would certainly not have opposed such a request. SFG did
19 not request additional time but, in fact, waited until it filed its reply brief to first raise the
20 timeliness issue and request that Johnson Utilities' opening brief be disregarded. Such a
21 tactic is consistent with SFG's prior attempts to poison the well in this case.

22 In addition, if SFG wants to stand on a technical reading of the filing deadline,
23 Johnson Utilities must point out that SFG's opening brief was *also* filed late.⁶ The date
24

25 ⁵ SFG Reply Brief at page 1, line 13.

26 ⁶ SFG's statement in its opening brief that its brief was filed ahead of the noon deadline is false. See Opening Brief at 1, lines 7-8.

1 stamp from Docket Control on SFG's opening brief shows it was filed at 2:05 PM on
2 May 22, 2009, which was two hours after the noon deadline. A copy of the time-
3 stamped cover page is attached as Attachment E.

4 In reality, SFG was not prejudiced by the timing of Johnson Utilities' filing.
5 SFG's counsel received both an electronic copy and a hard copy shortly after 5:00 PM on
6 Friday, May 22, 2009. SFG's interpretation that the "legal time of service was 8:00 a.m.
7 on Tuesday, May 26, 2009, following the Monday legal holiday" is simply ludicrous.
8 As SFG has done on a number of prior occasions, it has launched a personal attack on
9 Johnson Utilities and its legal counsel. This time, SFG has used what was an honest
10 mistake to distort the facts and file more inflammatory statements in the docket such as:

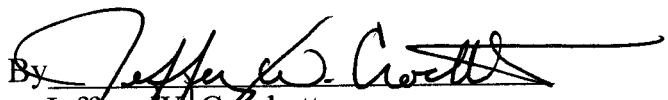
11 *It is time for the Commission to draw a line and set an example. Even a*
12 *millionaire and his huge law firm have to be held to the rule of law.*
Utility's brief should be rejected and disregarded. (Emphasis added.)⁷

13 **VI. CONCLUSION.**

14 For the foregoing reasons, the request of SFG that Johnson Utilities' opening brief
15 be disregarded should be summarily rejected.

16 RESPECTFULLY SUBMITTED this 1st day of June, 2009.

17 SNELL & WILMER L.L.P.

18
19 By 
20 Jeffrey W. Crockett
21 Robert J. Metli
22 One Arizona Center
23 400 E. Van Buren
24 Phoenix, AZ 85004-2202
25 Attorneys for Johnson Utilities, LLC

26 ⁷ *Id.* at page 2, lines 21-23.

1 ORIGINAL and 13 copies filed this
2 1st day of June, 2009, with:

3 Docket Control
4 ARIZONA CORPORATION COMMISSION
5 1200 West Washington Street
6 Phoenix, Arizona 85004

7 COPIES of the foregoing hand-delivered this
8 1st day of June, 2009, to:

9 Teena Wolfe, Administrative Law Judge
10 Hearing Division
11 ARIZONA CORPORATION COMMISSION
12 1200 W. Washington Street
13 Phoenix, Arizona 85007

14 Ayesha Vohra, Staff Attorney
15 Nancy Scott, Staff Attorney
16 Legal Division
17 ARIZONA CORPORATION COMMISSION
18 1200 W. Washington Street
19 Phoenix, Arizona 85007

20 Ernest Johnson, Director
21 Utilities Division
22 ARIZONA CORPORATION COMMISSION
23 1200 W. Washington Street
24 Phoenix, Arizona 85007

25 COPIES of the foregoing sent via e-mail and
26 first class mail this 1st day of June, 2009, to:

Craig A. Marks
CRAIG A. MARKS, PLC
10645 N. Tatum Blvd., Suite 200-676
Phoenix, Arizona 85028
Attorney for Swing First Golf, LLC

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Daniel W. Pozefsky, Chief Counsel
Residential Utility Consumer Office
1110 West Washington St., Suite 220
Phoenix, Arizona 85007

James E. Mannato
Florence Town Attorney
775 N. Main Street
P. O. Box 2670
Florence, Arizona 85253



CARROLB\SWDMS\10117572.3

ATTACHMENT A

BEFORE THE ARIZONA CORPORATION COMMISSION
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COMMISSIONERS

KRISTIN K. MAYES, Chairman
GARY PIERCE
PAUL NEWMAN
SANDRA D. KENNEDY
BOB STUMP

2009 MAY 22 P 4: 50

ARIZ CORP COMMISSION
DOCKET CONTROL

IN THE MATTER OF THE APPLICATION
OF JOHNSON UTILITIES, LLC, DBA
JOHNSON UTILITIES COMPANY FOR AN
INCREASE IN ITS WATER AND
WASTEWATER RATES FOR CUSTOMERS
WITHIN PINAL COUNTY, ARIZONA.

DOCKET NO. WS-02987A-08-0180

**NOTICE OF COMPLIANCE
WITH REQUIREMENT TO FILE
OPENING BRIEF ON THE
ADMISSIBILITY OF SWING
FIRST GOLF'S TRANSCRIPT**

Johnson Utilities, LLC, dba Johnson Utilities Company ("Johnson Utilities" or "Company") hereby files this Notice of Compliance ("Notice") with the Arizona Corporation Commission ("Commission") with respect to the filing of its Opening Brief on the Admissibility of Swing First Golf's Transcript into evidence in the above-captioned proceeding.

At the April 28, 2009, hearing, the Administrative Law Judge ("ALJ") ordered the parties to submit Opening Briefs regarding the Company's objection to the admissibility of the transcript into evidence offered by Swing First Golf. The ALJ also ordered that the transcript would remain sealed until the Commission ruled on the admissibility of the transcript. Because Johnson Utilities' Opening Brief contains numerous quotations, citations, and summaries of various portions of the sealed transcript, it would be very difficult to redact the Company's Opening Brief in such a manner so that a redacted version of the Opening Brief would be meaningful. Accordingly, Johnson Utilities has hand-delivered to each of the parties that have signed a Protective Agreement, the ALJ,

ATTACHMENT B

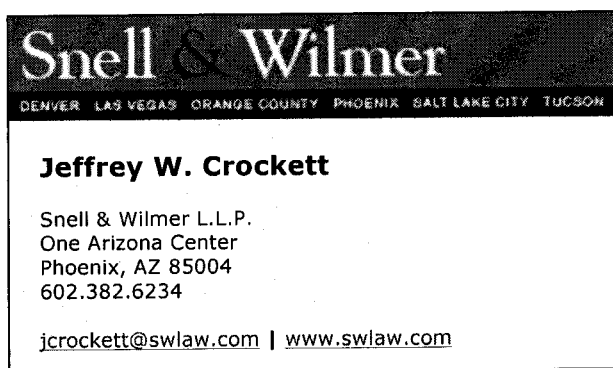
Ball, Gina

From: Crockett, Jeff
Sent: Friday, May 22, 2009 4:52 PM
To: 'Craig Marks'
Cc: Metli, Robert
Subject: RE: Swing First's Brief Concerning Admissibility of Document

Craig:

Rob Metli is in route to your mail drop with a copy of the Johnson Utilities opening brief on the admissibility of Swing First Golf's transcript. He should be there shortly.

Jeff



The information contained in this electronic mail message is confidential information intended only for the use of the individual or entity named above, and may be privileged. If the reader of this message is not the intended recipient or the employee or agent responsible to deliver it to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone (602-382-6000), and delete the original message. Thank you.

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-----Original Message-----

From: Craig Marks [<mailto:craig.marks@azbar.org>]
Sent: Friday, May 22, 2009 11:30 AM
To: 'Karyn Christine'; Crockett, Jeff; Carroll, Bradley; Kiefer, Kris; 'Dan Pozefsky'; James.Mannato@historicflorence.com; 'Ayesha Vohra'; 'Nancy Scott'; Metli, Robert
Subject: Swing First's Brief Concerning Admissibility of Document

Here is Swing First's Brief.

Craig

Craig A. Marks

6/1/2009

10645 N. Tatum Blvd.
Suite 200-676
Phoenix, AZ 85028
Craig.Marks@azbar.org
(480) 367-1956 Office
(480) 367-1956 Fax
(480) 518-6857 Cell

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-----Original Message-----

From: Karyn Christine [mailto:KChristine@azcc.gov]
Sent: Friday, May 22, 2009 8:28 AM
To: Crockett, Jeff; Carroll, Bradley; Kiefer, Kris; Craig Marks; Dan Pozefsky; James.Mannato@historicflorence.com; Teena Wolfe
Cc: Jeffery Michlik; Nancy Scott; Ayesha Vohra; Betty S. Camargo
Subject: Staff's Brief Regarding Admissibility of Ashton Transcript (08-0180)

Attached is Staff's Brief Regarding Admissibility of Ashton Transcript filed today in the above docket.

-----Original Message-----

From: Legal Scanner 1200 2nd floor [mailto:scanner@azcc.gov]
Sent: Friday, May 22, 2009 8:20 AM
To: Karyn Christine
Subject: Scanned Document

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ATTACHMENT C

Ball, Gina

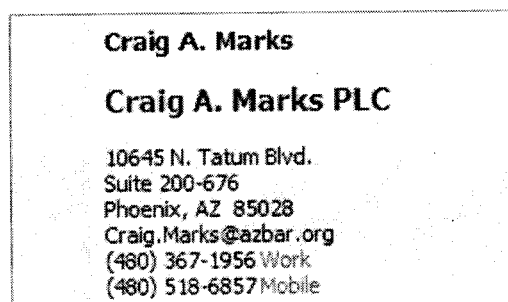
From: Craig Marks [craig.marks@azbar.org]
Sent: Friday, May 22, 2009 5:09 PM
To: Crockett, Jeff
Cc: Metli, Robert; Nancy Scott; avohra@azcc.gov; Daniel Pozefsky; James E. Mannato
Subject: RE: Swing First's Brief Concerning Admissibility of Document
Attachments: Craig A Marks.vcf

Jeff,

It looks like you have missed another deadline in this case. The briefs were due at 12:00, ahead of a holiday weekend. There is nothing on eDocket.

Your final DRs to Swing First were received after the discovery deadline and your rejoinder testimony was also late-filed. The other parties were courteous enough to e-mail copies of their briefs and I was courteous enough to e-mail you and every party a copy of my brief. In contrast, all I got from you was a terse e-mail that Rob is going to drop off a copy of your brief after 5:00, without any excuse or apology. I have already been to my "mail drop" today and I don't intend to go back there tonight.

Craig



Craig A. Marks
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 Phoenix, AZ 85028
Craig.Marks@azbar.org
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From: Crockett, Jeff [mailto:jcrockett@swlaw.com]
Sent: Friday, May 22, 2009 4:52 PM
To: Craig Marks

6/1/2009

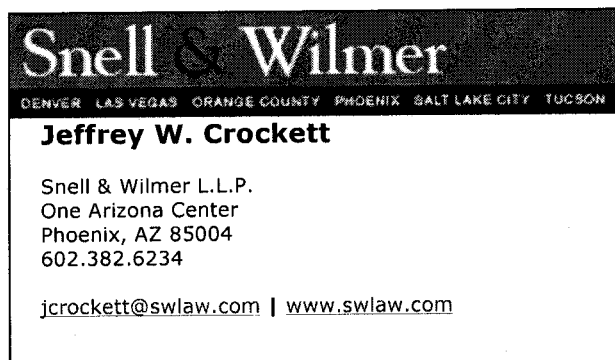
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To: 'Karyn Christine'; Crockett, Jeff; Carroll, Bradley; Kiefer, Kris; 'Dan Pozefsky'; James.Mannato@historicflorence.com; 'Ayesha Vohra'; 'Nancy Scott'; Metli, Robert

Subject: Swing First's Brief Concerning Admissibility of Document

Here is Swing First's Brief.

Craig

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Phoenix, AZ 85028
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From: Karyn Christine [mailto:KChristine@azcc.gov]

Sent: Friday, May 22, 2009 8:28 AM

To: Crockett, Jeff; Carroll, Bradley; Kiefer, Kris; Craig Marks; Dan Pozefsky; James.Mannato@historicflorence.com; Teena Wolfe

Cc: Jeffery Michlik; Nancy Scott; Ayesha Vohra; Betty S. Camargo

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Subject: Scanned Document

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ATTACHMENT D

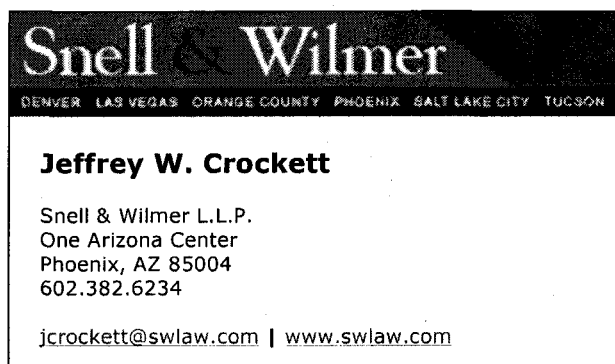
Ball, Gina

From: Crockett, Jeff
Sent: Friday, May 22, 2009 5:19 PM
To: 'Craig Marks'
Cc: Metli, Robert; Nancy Scott; avohra@azcc.gov; Daniel Pozefsky
Subject: Johnson Utilities' Opening Brief on Admissibility of the Transcript and Notice of Compliance
Attachments: Confidential Opening Brief.PDF; Notice of Compliance_052209.PDF

Craig:

My apologies for missing the deadline. I honestly believed that the filing deadline was 5:00 PM today. Attached is an electronic copy of Johnson Utilities' confidential opening brief on the admissibility of the transcript. I apologize for any inconvenience.

Jeff



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ATTACHMENT E

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BEFORE THE ARIZONA CORPORATION COMMISSION

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COMMISSIONERS

KRISTIN K. MAYES, Chairman
GARY PIERCE
PAUL NEWMAN
SANDRA D. KENNEDY
BOB STUMP

2009 MAY 22 P 2:05

AZ CORP COMMISSION
DOCKET CONTROL

Arizona Corporation Commission

DOCKETED

MAY 22 2009

DOCKETED BY

MS

IN THE MATTER OF THE APPLICATION OF
JOHNSON UTILITIES, LLC, DBA JOHNSON
UTILITIES COMPANY FOR AN INCREASE IN
ITS WATER AND WASTEWATER RATES FOR
CUSTOMERS WITHIN PINAL COUNTY,
ARIZONA.

DOCKET NO. WS-02987A-08-0180

INITIAL BRIEF CONCERNING
ADMISSIBILITY OF DOCUMENT

1 For the following reasons, Swing First Golf LLC ("Swing First") believes that the
2 document in question should be admitted.

3 The statements in the document are not hearsay. After her *in camera* review, Judge
4 Wolfe stated: "based on my preliminary review, there may be an issue of hearsay, but it's not
5 apparent to me at this time."¹ RUCO agrees: "Mr. Larsen's statements are admissions by a
6 party-opponent and are, therefore, not hearsay."² Swing First also cannot see any hearsay issue.

7 Even in the unlikely event that the statements were treated as hearsay, they would still be
8 admissible under the Commission's more relaxed evidentiary rules, particularly given that the
9 declarant could be called directly by Utility to testify as a rebuttal witness and explain his
10 statements.³

11 The statements in the document are relevant. After her *in camera* review, Judge Wolfe
12 stated:

13 Based on my preliminary review of this document, and in conjunction with other
14 evidence that was presented on the record and admitted last week, there have been

¹ Tr. at 352:4-7.

² RUCO Brief at 4:16-17.

³ It is possible that declarant may no longer be Utility's employee, but this would be no basis to argue against the admissibility of declarant's statements.